



# THE ATTORNEY GENERAL OF TEXAS

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February 28, 1972

Hon. Jimmy Morris  
Criminal District Attorney  
Navarro County Courthouse  
P. O. Box 1143  
Corsicana, Texas 75110

Opinion No. M- 1087

Re: Whether the Criminal District Attorney of Navarro County may become a member of the State Retirement System, pursuant to Article 6228a, Vernon's Civil Statutes, or the District and County Retirement System, pursuant to Article 6228g, Vernon's Civil Statutes.

Dear Mr. Morris:

Your recent letter requesting the opinion of this office concerning the referenced matter states, in part, as follows:

"The Criminal District Attorney of Navarro County is paid entirely from State funds. Art. 326k-63. Navarro County does not supplement the salary.

"Which retirement system may the Criminal District Attorney of Navarro County join--the 'State' (art. 6228a) or the 'District and County' (art. 6228g)?"

Section 3(B)(1) of Article 6228a, Vernon's Civil Statutes, which is the Act establishing the Employees Retirement System of Texas, provides as follows:

"The membership of said Retirement System shall be composed of any elective state official or appointee in an elective office of the state, including all elected or appointed members of the State Legislature, or elected by the members of either or both houses of the State Legislature, and also including District Attorneys receiving salaries paid by the State from the State General Revenue Fund, but shall not include any elective official in the Judicial, Education, District, or

County, of the State of Texas other than those expressed eligible as provided herein." (Emphasis added.)

The Texas County and District Retirement System is authorized by Section 62(c) of Article XVI of the Constitution of Texas. Pursuant to that constitutional provision, Article 6228g, Vernon's Civil Statutes, was enacted and sets forth the requisites and procedures for the County and District Retirement System. Section 2(6) of Article 6228g defines "employee" as follows:

"'Employee' means any person who is certified by a subdivision as being regularly engaged in the performance of the duties of an elective or appointive office, or of any position of employment with the subdivision, which office or position normally requires actual performance of duty during not less than nine hundred (900) hours a year, and as receiving compensation from the subdivision for the performance of such duties. Upon the terms and conditions set out in Section 11A, the term 'employee' includes any person regularly engaged in the performance of the duties of an elective or appointive State or district office who receives compensation, in addition to that received from the State of Texas, from the county or counties in which he serves, and the person with the approval of the respective subdivision shall be entitled to participate in the System to the extent of any additional compensation received from the participating subdivisions. The term 'employee' does not include any person as to any period of service for which he would be eligible to be included in or entitled to receive credit in . . . the Employees Retirement System of Texas. . . ." (Emphasis added.)

Your office was established by Article 326k-63, Vernon's Civil Statutes. Section 7 of that Article provides as follows:

"The criminal district attorney shall be compensated for his services by the state in such manner and in such amount as may be fixed by the general law relating to the salary to be paid to district attorneys by the state, and in addition his salary may be supplemented by the commissioners court in such amount as it deems advisable."

By your letter, you have advised us that, at present, your salary is paid solely out of State funds.

It is evident that you are not eligible for membership in the County and District Retirement System, inasmuch as you do not receive any compensation from Navarro County. See the underscored provisions of Section 2(6) of Article 6228g, supra.

Thus, the question remains as to whether you are eligible to participate in the Employees Retirement System of Texas. Section 3(B)(1) of Article 6228a, quoted supra, in setting forth those persons qualified for membership in that Retirement System, provides that the System shall include "District Attorneys receiving salaries paid by the State from the State General Revenue Fund. . ." District Attorneys paid by the State were included as being eligible for membership in the Employees Retirement System by the amendment in Acts 60th Legislature, Regular Session 1967, ch. 279, p. 668.

We must now consider whether you, as a criminal district attorney paid wholly with State funds, fall within the term "district attorneys" used in Article 6228g.

The term "criminal district attorney" has heretofore been defined by the Supreme Court of Texas. In Hill County v. Sheppard, 142 Tex. 358, 178 S.W.2d 261 (1944), that court stated as follows:

"It will be noted that the Constitution [Article V, Section 21] refers to a county attorney, a district attorney, and a criminal district attorney. What is meant by a 'criminal district attorney' as used in the Constitution, and what is the difference, if any, between that office and the office of district attorney, and is the office of criminal district attorney a constitutional office?

"\* \* \*

". . . It is sufficient to say that when the Constitution is construed in the light of the statute above quoted [Art. 349, V.C.S.], it is our opinion that the term criminal district attorney refers to a class or kind of district attorneys, and that a criminal district attorney is a district attorney within the meaning of the Constitution.

"The office of District Attorney, including that of criminal district attorney, is a constitutional office, the duties and compensation of which are provided for in Article V, Section 21, of the Constitution above quoted. . . ." 142 Tex. at 361-62, 178 S.W.2d at 262-63. (Emphasis added.)

See, also, Jones v. Anderson, 189 S.W.2d 65 (Tex.Civ.App. 1945, error ref.), Neal v. Sheppard, 209 S.W.2d 388 (Tex.Civ.App. 1948, error ref.) and 20 Tex.Jur.2d 297, District Attorneys, Sec. 1.

In view of the foregoing authorities, we therefore hold that you, as a criminal district attorney, paid entirely from State funds, fall within the purview of the term "district attorney" used in Article 6228a; accordingly, you are entitled to participate in the Employees Retirement System of Texas.

We are further of the opinion that criminal district attorneys paid by a county are not entitled to participate in the Employees Retirement System of Texas.

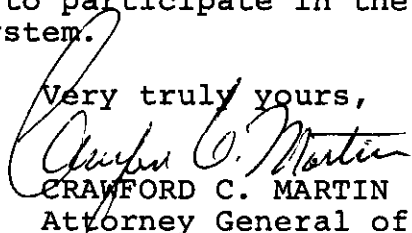
#### S U M M A R Y

The Criminal District Attorney of Navarro County, who is paid entirely with State funds, is a "district attorney" as that term is used in Article 6228a, Vernon's Civil Statutes, and is therefore entitled to participate in the Employees Retirement System of Texas.

The Criminal District Attorney of Navarro County, who receives no compensation from the County, is not entitled, pursuant to Article 6228g, Vernon's Civil Statutes, to participate in the Texas County and District Retirement System.

A criminal district attorney paid by a county is not entitled to participate in the Employees Retirement System.

Very truly yours,

  
CRAWFORD C. MARTIN  
Attorney General of Texas

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